

JSA Newsletter Employment Law

June 2022

As discussed briefly in our previous edition, the upcoming Code on Wages, 2019 (“**Wage Code**”) subsumes four central labour legislations, namely, the Payment of Wages Act, 1936, the Minimum Wages Act, 1948, the Payment of Bonus Act, 1965 (“**PBA**”) and the Equal Remuneration Act, 1976.

This edition of the JSA Employment Monthly Newsletter provides a brief overview and comparative analysis of the changes proposed under the Wage Code vis-à-vis the PBA and also discusses some of the recent interesting judicial precedents spread across several employment legislations.

Wage Code vis-à-vis the Payment of Bonus Act, 1965

The Wage Code is spread over 9 chapters with 69 sections. Sections 26 to 41 of the Wage Code deal with the payment of bonus.

Comparative analysis

Summarised below are some of the key differences between the proposed provisions in the Wage Code and the PBA:

PBA and the Wage Code		
Particulars	PBA	Wage Code
Establishments covered	Applies to every factory and every establishment engaging 20 or more persons on any day in the accounting year or other establishments as notified by the appropriate government (where such number of persons is less than 20 but more than 10). Applicability to subsist even if the number falls below 20 or such other number (for establishments notified by the government), in a specific accounting year.	Provisions under Chapter IV providing for payment of bonus are applicable to establishments engaging 20 or more persons on any day in the accounting year. There is no provision for establishments engaging less than 20 persons to be brought under the coverage of the act by way of government notification.
Change in “employee” definition	Any person drawing wages less than INR 21,000 per mensem and has completed at least 30 days of work in an accounting year is considered an employee under the PBA.	Any person drawing wages less than the ceiling wage (to be prescribed by the Government) and has completed at least 30 days of work in an accounting year is considered an employee under the Wage Code.
Change in “employer” definition	An occupier or owner of the factory, his agent or legal representatives of deceased owners; or person with ultimate control of affairs in an establishment fall within the definition of the term “employer”.	An expansive definition of the term “employer”, covering all persons directly or indirectly employing two or more persons, in addition to the qualifications laid down under the PBA to be considered an “employer” has been set out.

PBA and the Wage Code		
Particulars	PBA	Wage Code
Calculation of allocable surplus	Calculation of allocable surplus for companies other than banking companies is at 67% of the available surplus. For banking companies, corporations, co-operative societies, factories and all other categories of employers, the allocable surplus is calculated as 60% of available surplus.	Calculation for banking companies is at 60% of available surplus and all other establishments is at 67% of available surplus.
Available surplus	For the purposes of calculating available surplus, the PBA prescribed certain sums which are to be deducted from gross profits as prior charges. Third schedule of the PBA provides the additional sums which are to be excluded.	There is slight change in the sums which are to be excluded from gross profits ¹ and instead of any particular schedule under the Wage Code, the central government is required to prescribe the additional sums which are to be considered for deductions.
Rate of annual minimum bonus	The PBA defines the upper and lower limits of bonus payable. The ceiling wage per mensem is set at INR 7,000, or any other amount as fixed by the government. ²	The Wage Code leaves the minimum wage per mensem for eligibility and ceiling wage open to determination by the government. ³
Time limit and mode of payment of bonus	Bonus is to be paid by cash to the employee within 8 months of closing of the accounting year. In case of disputed bonuses, bonus is payable within 1 month of issuance of award/order.	Bonus is to be credited to the bank account of the employee within 8 months from the closing of the accounting year. In case of pending disputes (wherein bonus claimed is higher), bonus calculated per 8.33% of wages is payable 8 months from the closing of the accounting year. In other cases, bonus becomes payable within 1 month of issuance of award.
Disqualification	An employee dismissed from service on account of fraud, violent behaviour on the premises of the establishment or theft, misappropriation or sabotage of establishment property – is disqualified from being eligible for payment of bonus.	In addition to the disqualifications under the PBA, dismissal on account of conviction for sexual harassment, is also added.
Exemption from compliance	Authorizes the government to, by way of official notification in the gazette, exempt an establishment or a class of establishments from compliance with provisions under the PBA for a period as maybe specified, having regard to the financial position or other relevant circumstance.	There is no provision authorising exemption of establishments from compliance of the Wage Code.

¹ The following has been excluded: “any amount by way of development rebate or investment allowance or development allowance which the employer is entitled to deduct from his income under the income-tax Act”.

² The bonus payable is calculated as: (i) For all employees earning up to INR 7,000 per mensem: 8.33% of the wages or INR 100, whichever is higher; (ii) For employees earning above INR 7,000 up to INR 21,000 per mensem: 8.33% of wages as if the employee earned INR 7,000 per mensem. For employees who have not completed 15 years as on the date of the end of accounting year, the minimum bonus payable is INR 60.

³ For the purpose of distinction, the methodology of calculation of bonus remains the same as the PBA, capped at the rate of 8.33% of wages, however, with a minimum bonus of INR 100.

PBA and the Wage Code		
Particulars	PBA	Wage Code
Initiation of Proceedings	Authorises the inspector to initiate prosecution proceedings upon discovery of non-compliance by the employer, without any grant of grace period for compliance.	Provides for the direction of compliance by way of notice to the defaulting employer within a specified period by the inspector-cum-facilitator. Subsequent non-compliance of the employer attracts initiation of prosecution proceedings. ⁴
Penalty	Provides for imprisonment of up to six months and up to INR 1,000 fine, or both, for contravention of provisions of the act or non-compliance of a direction or requisition issued under the PBA.	Provides for graded penalties basis the nature of violation, such as first and second instances non-payment of bonus by the employer, non-maintenance of records and contravention of other provisions of the Wage Code. ⁵ The quantum of fines levied as penalties under the Wage Code go up to INR 1,00,000 and a maximum imprisonment of up to three months.

Distinctive features

In addition to the changes in relation to floor wages and inspector cum facilitator profiles discussed earlier, summarised below are some of the distinctive features of the Wage Code vis-à-vis PBA:

1. **“Employer” ambit:** The Wage Code introduces a more expansive definition of the term “employer”, to cover any person directly or indirectly employing two or more persons. Further, an employee can now be disqualified from entitlement of bonus on grounds of sexual harassment.
2. **Accounting year uniformity:** The Wage Code introduces a uniform accounting year for all establishments.
3. **Dispensation of payment:** It is now the employers liability to pay the bonus calculated per 8.33% of wages within 8 months of the end of the accounting year in cases where a dispute is pending for claim of higher bonus.
4. **Opportunity to comply:** It is the duty of the Inspector-cum-Facilitator to afford employers the opportunity to comply with provisions of the Wage Code within a specified period prior to the initiation of prosecution proceedings.
5. **Graded imposition of penalties:** The Wage Code introduces the levy of fines and imprisonment basis the nature of violation of provisions by the employer.

Case Law Ratios

Termination of a woman seeking benefits under the Maternity Benefit Act, 1961 held unlawful

In the case of *Asia Pacific Institute of Management v. Office of the Joint Labour Commissioner and Another*⁶ the court considered the legality of a relieving letter served to a pregnant employee without any mention of grounds of misconduct. The court, while referring to Section 27 of the Maternity Benefit Act, 1961, observed that provisions of the act will override all contractual terms of service existing between the employee and employer. It was held that in

⁴ Such provision of opportunity to comply is not applicable to employers repeating the same violation within five years of the first instance of a violation of the same nature.

⁵ For non-payment of bonuses due to employees, the Wage Code prescribes a fine of up to INR 50,000. Should the employer default on payments due once again, within a period of five years from the first instance of such default, such subsequent offence may be punishable with imprisonment of up to 3 months or with a fine of up to INR 1,00,000 or both. For contravention of other provisions of the Act, the employer may be imposed with a fine up to INR 20,000. Should the employer commit the same offence within five years, the employer may be punished with imprisonment of up to one month, a fine of up to INR 40,000 or both. For non-maintenance of records, the employer may be punished with a fine of up to INR 10,000.

⁶ 2022 LLR 602 (Delhi HC)

the absence of any grounds of misconduct, the employer's act of terminating service was driven by a motivation to deprive the employee of her maternity benefits and therefore in contravention of the provisions of the Maternity Benefit Act, 1961.

Refusal to vacate employer allotted premises a valid ground for dismissal from service

In the case of *Manipal University, Manipal v. Sri Suraj*⁷ the respondent, a Health Inspector, holding responsibilities a supervisory nature was dismissed from service by the petitioner on account of his non-responsiveness and inaction to notices issued by the petitioner requesting him to vacate the office space allocated to him. Upon challenge of such dismissal by the respondent, the Central Government Industrial Tribunal-cum-Labour Court, assessing the respondent to be a "workman" under Section 2(s) of the Industrial Disputes Act, 1947 ("ID Act"), held that the punishment order was disproportionate, and directed reinstatement of the respondent with back wages. On appeal, the High Court of Karnataka quashed the award of the tribunal upholding the petitioner's dismissal from service, observing that the petitioner did not qualify as a "workman" under the ID Act, since he drew wages exceeding INR 1,600 per mensem and was also allotted tasks bearing a supervisory nature.

Reinstatement of a workman, when awarded, must be done at his original place of employment

In the case of *Patil Veershetty v. the Management*⁸, the dismissal of a workman by the respondent was rejected, and his reinstatement was ordered by the Assistant Commissioner of Labour (Conciliation officer). The respondent, by way of a transfer order, reinstated the petitioner to another location and subsequently refused to pay wages to the petitioner on account of his failure to report to work at the new location. The petitioner challenged his reinstatement at the new location and claimed entitlement for back wages under Section 17B of ID Act. Relying on the case of *Lakshmi Mills v. Labour Court*⁹ and *Deepali Gundu Surwase v Mahavidyalaya*¹⁰, the Madras High Court held that rejection of dismissal order rendered such dismissal void ab initio, and therefore reinstatement could be made only be at the place of original employment of the workman.

Evidence prepared after the issue of the charge-sheet is inadmissible

In the case of *Chief General Manager v. Rajnoo*¹¹ the court decided on whether the new evidence could be admitted after the filing of a charge sheet. The court relied on the decision of *Laxmi Devi Sugar Mill v. Nand Kishore Singh*¹², to hold that the termination of service of the respondent on the ground of continued absenteeism was invalid, given that records of the respondent's attendance indicating absenteeism were not submitted in the charge sheet at the time of enquiry and were prepared subsequent to the issuance of charge sheet.

Unauthorised and prolonged absenteeism forms a valid ground for termination from service

In the case of *M.V. Gururaj v GM, Bharat Earth Movers Ltd.*¹³ the court observed that absence from duty without any application or prior permission amounts to unauthorised absence. It held that the petitioner's termination from service was proportionate, taking into consideration his prolonged absenteeism and history of misconduct.

Do you know?

Nascent Information Technology Employees Senate ("NITES"), a Pune based information technology employee union, had in the month of April 2022 filed a complaint with the Minister of Labour and Employment ("Ministry") seeking the removal of prevailing 'non-compete clause' from the employment agreements of Infosys, whereby the employees were restricted from (a) working with the client(s) of Infosys; and (b) accepting any employment offer from its

⁷ 2022 LLR 374 (Karnataka HC)

⁸ 2022 LLR 24 (Madras HC)

⁹ 1997 (3) LLN 354

¹⁰ 2013 (10) SCC 324

¹¹ (2017) 2 MPLJ 149 (Madhya Pradesh HC)

¹² AIR 1957 SC 7

¹³ 2017 LLR 666 (Karnataka HC)

competitors such as TCS, Accenture, Cognizant, among others, for a period of 6 months post termination of employment at Infosys.

Pursuant to the said complaint, the Ministry had instructed Karnataka Labour Department to investigate and undertake necessary action in this regard. The Karnataka Labour Department had issued a notice in the month of July 2022, calling for a joint meeting between Infosys and NITES. The outcome of this matter is currently pending and is yet to be decided.

Employment Practice

JSA has a team of experienced Employment Law specialists who work with clients from a wide range of sectors, to tackle local and cross-border, contentious and non-contentious employment law issues. Our Key areas of advice include (a) Advising on boardroom disputes including issues with directors, both executive and non-executive; (b) Providing support for business restructuring and turnaround transactions, addressing employment and labour aspects of a deal, to minimize associated risks and ensure legal compliance, (c) Providing transaction support with reference to employment law aspects of all corporate finance transactions, including the transfer of undertakings, transfer of accumulated employee benefits of outgoing employees to a new employer, redundancies, and dismissals, (d) Advising on compliance and investigations, including creating Compliance Programs and Policy, Compliance Evaluation Assessment and Procedure Development and providing support for conducting internal investigations into alleged wrongful conduct, (e) Designing, documenting, reviewing, and operating all types of employee benefit plans and arrangements, including incentive, bonus and severance programs, (f) Advising on international employment issues, including immigration, residency, social security benefits, taxation issues, Indian laws applicable to spouses and children of expatriates, and other legal requirements that arise when sending employees to India and recruiting from India, including body shopping situations.

JSA also has significant experience in assisting employers to ensure that they provide focused and proactive counselling to comply with the obligations placed on employees under the prevention of sexual harassment regime in India. We advise and assist clients in cases involving sexual harassment at the workplace, intra-office consensual relationships, including drafting of prevention of sexual harassment (POSH) policies, participating in POSH proceedings, conducting training for employees as well as Internal Complaints Committee members, and acting as external members of POSH Committees.

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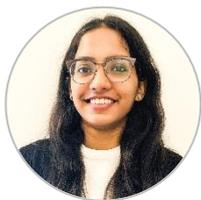
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13 Practices and
22 Ranked Lawyers



15 Practices and
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2 Ranked Lawyers



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